No. 83-1341

In the Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN COAL TRAFFIC LEAGUE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the Interstate Commerce Commission's rule allowing it to consider evidence of indirect forms of competition —product and geographic competition—in deciding whether a railroad has market dominance, which is a jurisdictional prerequisite to the Commission's authority to rule on the reasonableness of the rail carrier's rates under 49 U.S.C. (Supp. V) 10709(a).

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OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (Pet. App. A1-A22) is reported at 719 F.2d 772. The original panel opinion of the court of appeals (Pet. App. C1-C35) is reported at 694 F.2d 378. The decision of the Interstate Commerce Commission (Pet. App. D1-D24) is reported at 365 I.C.C. 118.

JURISDICTION

The judgment of the court of appeals (Pet. App. G1-G2) was entered on November 14, 1983. The pe-

tition for a writ of certiorari was filed on February 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1976, the Interstate Commerce Commission's (ICC) historic power to regulate railroad rates under the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10501, 10709(b) and (c), has been confined to situations where the railroad possesses "market dominance," a term statutorily defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies" (49 U.S.C. (Supp. V) 10709(a)).[1] The market dominance provision was a key part of Congress's effort in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) (Pub. L. No. 94-210, 90 Stat. 31 *et seq.*) to allow railroads greater regulatory freedom in contexts where competitive market forces would protect the shipping public from unreasonably high railroad rates.[2] Congress directed the Commission, after consulting with the Attorney General and the Federal Trade Commission, to implement the new jurisdictional limit by establishing practical standards and procedures for determining whether a carrier possesses market dominance. Section 202(b) of the 4R Act, 90 Stat. 35.

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[1] As originally enacted the definition referred to "an absence of effective competition * * * *for the traffic or movement.*" In recodifying and simplifying the Interstate Commerce Act in 1978, 92 Stat. 1337 *et seq.*, Congress changed the phrase "traffic or movement" to "transportation." Congress stated that no substantive change was intended by that or any other changes in the law. (§ 4(b), 92 Stat. 1466).

[2] See S. Rep. 94-499, 94th Cong., 1st Sess. 47 (1975); H.R. Rep. 94-781, 94th Cong., 2d Sess. 148 (1976).

In its original decision implementing the market dominance requirement, the ICC adopted, over the objection of the Department of Justice and the FTC, a rule that precluded it from considering evidence of indirect forms of competition (Pet. App. H1-H28).[3] The ICC's primary reason for excluding this evidence was that it would unduly complicate the Commission's rate review process (Pet. App. H9-H12). On judicial review of the Commission's original regulations, the Department of Justice and others challenged the Commission's interpretation of market dominance, but the court of appeals sustained the Commission's interpretation. *Atchison, T. & S.F. Ry.* v. *ICC*, 580 F.2d 623 (D.C. Cir. 1978). The court did not hold that the ICC's interpretation was "the correct" one. Instead, the court held that there was a "sufficient basis in the statutory language and purpose to merit our deferral to the Commission's view" (*id.* at 634).[4]

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[3] Geographic competition in the railroad industry refers to the situation where the shipper can obtain the same product from an alternate source, using a different carrier (*e.g.*, another railroad, or a truck or barge), or can ship the same product to a different destination, again using another carrier. "Product competition" means that a shipper can use a substitute product carried by a different carrier (Pet. App. A2 n.5).

[4] The court noted (580 F.2d at 634) that the Commission's interpretation of the statutory language "may appear to some as an attempt to attribute excessive significance to a terse statutory clause," but nevertheless the court deferred to the Commission's view. The court observed that the Commission's rules were only a "first cut" subject to reexamination in light of experience (*id.* at 630, 640). See also *Central Power & Light Co.* v. *United States*, 634 F.2d 137, 173 n.72 (5th Cir. 1980), cert. denied, 454 U.S. 831 (1981).

2. In 1979, the ICC announced a change of position on the market dominance issue. In a decision responding to a limited remand from the court of appeals on an unrelated issue, the Commission advised the court that it was evaluating further its definition of market dominance "in light of the experience gained in the 28 months since we promulgated our regulations." *Special Procedures for Findings of Market Dominance, Ex parte* No. 320, 359 I.C.C. 735 (1979). As part of that analysis, the Commission concluded that evidence of geographic and product competition was relevant and would be admissible in rebuttal where shippers had already established a presumption of market dominance based on other evidence. Thereafter, the Commission proposed new market dominance regulations, which explicitly invited interested parties to submit evidence of geographic and product competition. 45 Fed. Reg. 3353 (1980).[5] In practice, since at least 1979, the Commission has consistently considered evidence of both forms of competition in making a market dominance determination.[6]

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[5] Those proposed regulations turned out in some respects (not relevant here) to be in conflict with the market dominance provisions of the subsequently enacted Staggers Rail Act of 1980. Consequently, the Commission withdrew that proposal and issued new regulations in its Sub-No. 2 proceeding which is here under review (Pet. App. D20-D24).

[6] In one case, the Commission dismissed a complaint based on a finding of effective geographic competition, but its decision was remanded. See *Central Power & Light Co.* v. *United States, supra.* The court found the Commission's consideration of geographic competition to be inconsistent with its original decision excluding such evidence and remanded to the Commission for further explanation of the reasons for its

3. In response to the continuing economic plight of the railroad industry and criticism that the ICC's implementation of the 4R Act, including its "market dominance" test, had freed very little rail traffic from rate regulation,[7] Congress considered further reforms. Included among the proposals was one to replace the market dominance provision enacted in the 4R Act with detailed statutory criteria, requiring the Commission to consider, among other things, geographic competition. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 4-5, 38-40 (1980). When Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, it decided instead to retain the 4R Act's market dominance provision, and supplement it with a new provision that automatically deregulated rail rates below a certain revenue-to-variable cost ratio. 49 U.S.C. (Supp. V) 10709 (d)(2).[8]

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departure from its prior interpretation. The court expressly declined, however, to preclude the Commission on remand from adopting an interpretation of market dominance that included consideration of geographic competition. 634 F.2d at 172-175.

[7] A report issued in late 1979 by consultants retained by the Commission to study the effectiveness of its market dominance regulations concluded that very little rail traffic (under 5% long term, 10-15% short term) was market dominant if all transportation alternatives were properly considered. A. Kearney, *A Study to Perform an In-Depth Analysis of Market Dominance and its Relationship to Other Provisions of the 4-R Act* (1979). A House Committee found that the Commission's regulations exempted less than 30% of railroad traffic from rate regulation. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 38 (1980).

[8] Despite the report of an oversight committee criticizing the Commission's consideration of geographic and product competition under the 4R Act, *House Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess., *Report on Railroad Coal*

4. Following enactment of the Staggers Act, the Commission adopted new market dominance regulations (Pet. App. D1-D24). The Commission approved new evidentiary guidelines that explicitly permit introduction of evidence of geographic and product competition (Pet. App. D20-D24). The Commission explained that it was reversing its prior decision on this issue, because the original interpretation of the statute was unnecessarily restrictive; the language of the statute readily embraces indirect competition, and nothing in the 4R Act indicated a Congressional intent that the Commission should consider only "direct" competition (Pet. App. D15-D16). The Commission also addressed the issue of administrative feasibility, stating that it no longer believed it appropriate to ignore relevant evidence, and that with appropriate guidelines evaluation of the evidence should be manageable in most cases (*id.* at D18).

A divided panel of the court of appeals set aside the Commission's new regulations (Pet. App. C1-

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Rates and Public Participation: Oversight of ICC Decision Making (Comm. Print 96-IFC 1980), Congress did not restrict the Commission's power to set standards for market dominance. Instead, the final conference report on the Staggers Act emphasized the ICC's continuing responsibility to administer the market dominance provision to achieve the central goal of freeing up traffic subject to effective competition (H.R. Rep. 96-1430, 96th Cong., 2d Sess. 89 (1980)):

> In maintaining the term market dominance * * * the Conferees intend that whenever there is effective competition which will restrain rate increases by the railroads, such competition should continue to function as the regulator of the rate rather than the Commission. Maintenance of the "market dominance" standard is not intended in any way to restrict the ability of the Commission to apply this concept, both in its regulations and individual cases.

C35). The panel majority concluded that there might well be sound economic or administrative reasons for permitting the Commission to consider product and geographic competition (*id.* at C20), but reasoned that Congress's choice of the preposition "for" rather than "with," in the phrase "effective competition for * * * the transportation to which a rate applies," demonstrated a clear intent to preclude consideration of indirect competition (*id.* at C18-C21).

By a vote of eight to two, the court of appeals sitting en banc set aside the panel decision and affirmed the Commission's new market dominance standards (Pet. App. A1-A22). The court found (*id.* at A9) that the disputed 4R Act definition of market dominance does not contain "a detailed congressional formula for determining market dominance," but instead contains "a generally phrased test designed to achieve a stated goal—deregulation of rail rates subject to effective competition."[9] To implement that policy Congress delegated to the Commission broad discretion in the 4R Act to set market dominance standards (Pet. App. A9, A11).[10]

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[9] The court declined to give dispositive weight to Congress's use of the preposition "for" as opposed to "with" in defining market dominance (Pet. App. A8, n.10). In addition, the court agreed with the ICC (Pet. App. A11) that nothing in the 4R Act evinces an intent to preclude consideration of indirect competition or requires the ICC "to make its decisions in a regulatory vacuum ignoring the practical effects of indirect competition."

[10] The court of appeals also found (Pet. App. A12) that Congress, in the Staggers Act, reinforced the delegation of broad discretionary authority to the ICC to apply the market dominance concept.

The court of appeals deferred to the Commission's conclusion that consideration of indirect competition would further Congress's intention to limit rate regulation to situations where market forces will not protect shippers and the Commission's judgment that "consideration of such evidence is feasible within the requirements of the 4R Act" (Pet. App. A11). The court acknowledged that the ICC had departed from its prior position on both points (*id.* at A9), but held that the Commission was entitled to change its mind in light of experience and that the Commission had adequately explained its reasons for the change (*id.* at A10).

ARGUMENT

Petitioners' arguments have all been fully considered, first by a panel of the court of appeals, and then by the full en banc court of appeals. The latter rejected petitioners' contentions in a thoughtful and reasoned opinion, one that does not conflict with any holding of this Court or of another court of appeals. Further review is, therefore, not warranted.

1a. Petitioners argue (Pet. 13) that the literal meaning of the statutory definition of market dominance precludes consideration of geographic and product competition. They urge that the statute confines the inquiry to transportation alternatives that can compete for transportation of the same product between the same points, *i.e.*, "the transportation to which a rate applies." [11] In fact, the statute is not so limited.

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[11] Petitioners have apparently abandoned the reasoning adopted by the original panel majority and the two dissenters from the decision of the court sitting en banc. The latter relied on Congress's choice of the preposition "for" instead of "with." See Pet. App. A14-A15, C18-C20. That analysis was

The ICC explained why the language relied upon by petitioners does not preclude geographic or product competition (Pet. App. D15-D16):

> Since the "traffic to which the rate applies" faces competition from other sources or destinations of the same product or from substitute products, the carriers transporting that traffic face "indirect" competition from other carriers. * * * "[E]ffective competition from other carriers or modes of transportation, for the traffic to which a rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes.

The language in Section 202(b) is thus not an obstacle to the ICC's decision to consider indirect competition. "Indeed, nothing in the 4R Act evinces congressional intent to preclude consideration of indirect competition" (Pet. App. A10-A11) and petitioners have pointed to nothing in the legislative history that specifically indicates Congress had direct competition in mind as the exclusive basis for the Commission's inquiry into market dominance.

Instead, petitioners refer (Pet. 12-13) to general statements in the legislative history regarding Congress's desire to avoid regulatory delay. From those

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properly rejected by the eight-member majority as an insubstantial "prepositional controversy" leading to a result inconsistent with the overall purpose of the legislation (*id.* at A9 n.10). Although the dissent found the Commission's original interpretation persuasive based on its expertise (Pet. App. A14-A16), it is noteworthy that the Commission, in that original decision, apparently found no controlling significance in the choice of the preposition; it referred to direct competition "*with* the service outlined in the tariff" (Pet. App. H9 (emphasis added)).

statements, petitioners conclude that Congress restricted the definition of market dominance by referring only to competition from other carriers or modes carrying the same product between the same points. Petitioners point to nothing, however, that connects those legislative statements with the 4R Act definition of market dominance. There is evidence in the legislative history that Congress took seriously the concerns expressed by the ICC Commissioners that the "market dominance" provision might involve the ICC in complex antitrust litigation that could not be handled efficiently in ICC proceedings. Congress responded to those concerns, however, by delegating to the Commission the "authority to adopt rules of practical application which will identify markets in which dominance exists." S. Rep. 94-499, 94th Cong., 1st Sess. 47 (1975); see generally Pet. App. H16-H22.

b. Petitioners also argue (Pet. 15-16) that Congress in the Staggers Act of 1980 ratified or adopted the ICC's original 1976 interpretation of the statute.[12]

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[12] In support of this theory, petitioners cite (Pet. 16 n.17) an article by former Congressman Eckhardt. This article is entitled to little, if any, weight as a plain attempt to create "subsequent legislative history" of the sort rejected by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132-133 (1974).

In a brief in support of the petition (at 5-9), a number of congressmen argue as amici curiae that the ICC had no authority to change its interpretation of the market dominance provision in *Ex parte* No. 320 (Sub-No. 2), because the original delegation of authority to the ICC to implement the market dominance provision (Section 202(b) of the 4R Act, 90 Stat. 35, formerly codified at 49 U.S.C. 1(5)(d)) expired after 240 days and was subsequently repealed by Pub. L. No. 95-473, § 4(b), 92 Stat. 1466-1470 (the "recodification"). This novel argument, never previously urged by any

The argument is based on Congress's failure to adopt a proposal which would have *required*, inter alia, consideration of geographic competition, in favor of retaining the original 4R Act definition. The proposal to which petitioners refer, H.R. 7235, 96th Cong., 2d Sess. § 202(c) (1980), would have replaced the generally phrased 4R Act definition of market dom-

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party before the ICC or the court of appeals, is not properly before the Court. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33 (1952). Moreover, like their argument regarding the history of the 4R Act this reconstruction of history should be disregarded. See *Regional Rail Reorganization Act Cases*, 419 U.S. at 132-133.

In any case, the theory is not corroborated by the legislative history of the 4R Act. Nothing indicates that Congress viewed the 240-day deadline as precluding later revision of the regulations originally adopted. Certainly, the D.C. Circuit envisioned further refinement of the standards when it upheld the original regulations (see note 4, *supra*).

Nor is there evidence that Congress sought to freeze the original regulations when it repealed Section 202(b) of the 4R Act in the 1978 recodification. To the contrary, in repealing Section 202(b) and numerous other provisions that had been executed, superseded, or otherwise rendered obsolete by the time of the 1978 recodification, Congress stated that the changes were meant to effect no substantive change in the Interstate Commerce Act. (§ 4(b), 92 Stat. 1466). Moreover, even if the Commission's authority to set standards was eliminated in 1978, the Commission still has broad rulemaking power under 49 U.S.C. (Supp. V) 10321(a). Cf. *American Trucking Ass'n* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

Finally, any doubt concerning the Commission's continuing power to construe the market dominance concept was removed in the Staggers Act. As the court of appeals pointed out, the Staggers Act reflects a "reinforced congressional intent to allow the ICC to continue to promulgate standards and procedures for making the market dominance determination" (Pet. App. A12), citing the final conference report (H.R. Rep. 96-1430, 96th Cong., 2d Sess. 89 (1980)).

inance with a detailed statutory definition that included a specific reference to geographic competition. That proposal would have removed much of the discretion originally conferred on the ICC to implement and administer the market dominance concept. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 4-5, 55-56 (1980). Failure to adopt a proposal that would have modified significantly the Commission's discretion to define market dominance does not support an inference that Congress intended to forbid the ICC from considering geographic and product competition.[13]

In fact, when the Staggers Act was passed and Congress decided to retain the existing market dominance provision of the 4R Act, the existing law was that indirect competition is a relevant criterion. As the court of appeals pointed out (Pet. App. A12), Congress was aware when the Staggers Act was debated that the ICC had been considering geographic and product competition in its market dominance determinations.[14]

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[13] Petitioners also cite (Pet. 14 n.15) Section 205 of the Staggers Act (94 Stat. 1905) in support of their reading of the statute. In that Section, Congress directed the ICC to study the feasibility of considering product competition in the context of determining reasonableness of rates, as opposed to market dominance. Congress was, however, conscious that Section 205 might be misinterpreted in the dispute over whether to consider product and geographic competition in the market dominance inquiry, and therefore it expressly stated that the enactment of Section 205 should not be considered "in any proceeding * * * to determine the proper scope of the term 'market dominance'." § 205(a)(3)(B), 94 Stat. 1906.

[14] As petitioners point out (Pet. 6), an oversight committee of Congress criticized the Commission's decision in *Incentive Rates on Coal—Axial, Co. to Coleto Creek, TX*, 362 I.C.C. 572 (1980), in which it relied upon indirect competition in mak-

2a. Petitioners argue (Pet. 16-20) that the court of appeals abdicated its judicial review responsibilities by failing to conduct an independent statutory analysis and, instead deferring to the ICC's later (rather than its original) interpretation. Neither of these contentions has merit.

Petitioners' basic quarrel with the court of appeals is that the court did not agree with petitioners' view of the plain meaning of the statute. The court of appeals held (Pet. App. A9):

> The 4R Act does not contain a detailed congressional formula for determining market dominance. Instead, it contains a generally phrased test designed to achieve a stated goal—deregulation of rail rates subject to effective competition.

Although the court of appeals properly approached the problem "with a recognition of [its] limited role * * * in reviewing an administrative agency's construction of its statutory authority and the regulations promulgated pursuant thereto" (Pet. App. A7), it did not abdicate its responsibility. It considered petitioners' "plain meaning" contention (Pet. App. A8 n.10), but agreed with the ICC's interpretation, which is that the statute does not require, but does permit consideration of geographic and product competition.

Petitioners' argument assumes improperly that there can be only one "correct" interpretation of this

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ing its market dominance determination under the 4R Act. Petitioners emphasize the criticism, which is irrelevant: what is relevant is that in the debates leading to enactment of the Staggers Act, the members on the oversight committee were obviously aware that the ICC then considered geographic and product competition evidence admissible under the original 4R Act, but nevertheless Congress reenacted that provision.

statute. But in fact Section 202(b) is open-ended and indeterminate, and the court of appeals was quite correct in concluding that the Commission's reading is permissible and should therefore be upheld. See, *e.g.*, *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981); *Batterton* v. *Francis*, 432 U.S. 416 (1977). Deference is particularly appropriate where, as here, Congress delegated to the agency the task of providing specific content to a broad statutory directive. See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 593-599 (1981); *NLRB* v. *Hearst Publications*, 322 U.S. 111, 126-127 (1944).

b. In urging that the court of appeals erred in failing to give adequate weight to the ICC's original 1976 decision, petitioners invoke (Pet. 17-20) the well-established principle that the contemporaneous interpretation of a statute by agency officials who participated in legislative deliberations is to be given great weight by a reviewing court. Although that consideration properly played a role in the D.C. Circuit's review of the ICC's 1976 decision (see page 3, *supra*), it is of much more limited importance here. Under petitioner's theory, once an agency has interpreted a statute, that interpretation is frozen for all time, unless Congress enacts new legislation. But administrative law is not so inflexible. As this Court recognized in *American Trucking Ass'n* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967), "the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." The agency's authority to modify its prior interpretations is, of course, limited by its obligation to provide a

reasoned explanation for the change. The ICC, in 1981, presented an adequate explanation for its change of position on the indirect competition issue.[15]

3. Petitioners assert (Pet. 8-11) that the effect of the Commission's new interpretation will be to reduce the number of rate filings the agency will review for reasonableness and therefore shippers will not be adequately protected from abuses by carriers. This argument is, however, addressed to the wrong branch of government. It was Congress that decided that shippers should derive their primary protection from the market and not from the ICC. The decisions of the Commission and the court are faithful to that decision. Since the court below correctly applied settled principles of judicial review to the Commission's action, further review by this Court is unwarranted.

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[15] Petitioners argue (Pet. 18-19) that the ICC offered no new evidence or analysis to support its change of position on the question of the feasibility of considering geographic and product competition. In its decision, the ICC relied principally upon the adoption of the new guidelines to overcome the problem (Pet. App. D18):

> We no longer believe that it is appropriate to assume, prior to any investigation, that this problem would exist in every case. With appropriate guidelines for submitting evidence, determining the presence of effective geographic or product competition should be manageable in most cases.

The Commission's decision was thus "primarily of a judgmental or predictive nature" and complete record support was not required. *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978). In addition, as noted above, the ICC had in fact been considering such evidence for years in rate cases and it was not incumbent upon the ICC to present evidence of that fact in order to invoke its experience.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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